91-1029

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1991

MARLENE ANDERSON, THOMAS ANDERSON, ROBERT J. REESE, ELEANOR S. REESE, IRENE M. GRABLE, STIDGER DUNN, CATHERINE DUNN, DOROTHY E. VAN SCYOC, CHARLES A. STONER, DOROTHY STONER, RALPH T. EISIMINGER, LORETTA A. EISIMINGER, ANDREW J. HUFFMAN JR., MARIE S. HUFFMAN, FRANCES I. GENSLER, KENNETH G. DEITREICH, and ELEANOR DEITREICH,

Petitioners,

v.

CONSOL-PENNSYLVANIA COAL CO., RHEIN BRAUN U.S., MONONGAHELA RAILWAY CO., DAVID BOGGS, EWING POLLOCK, POLLOCK, POLLOCK AND THOMAS, THE UPSHUR AGENCY, INC., CONSOLIDATED COAL CO., CONSOL-LAND DEVELOPMENT CO., RHEINISCHE BRAUNKOHLENWERKE, MARIA THERESE VERKAUFSGESELLSCHAFT, KARL NIXON, MIKE WILSON, and WILLIAM REESE,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the failure of a named plaintiff in a class action to move for class certification within the time specified by a local rule of court automatically end the tolling of the statute of limitations as to absent class members even without a court order denying class certification?

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OPINIONS BELOW

The decision of the United States District Court for the Western District of Pennsylvania was filed on June 18, 1990. It is set forth in the Appendix at A-1, and has been officially reported at 740 F. Supp. 1126. The per curiam decision of the United States Court of Appeals for the Third Circuit affirming the district court ruling was entered on September 24, 1991. It appears in the Appendix at A-44, and has been officially reported, in table form, at 930 F.2d 909.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The final disposition of this case below was the Third Circuit's affirmance of the district court's summary judgment on September 24, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 23(c)(1) declares in relevant part that:

> As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.

Local Rule 34(c) for the United States District Court for the Western District of Pennsylvania provides in pertinent part as follows:

> Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion

> for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action.

STATEMENT OF THE CASE

On April 19, 1983, Dorothy Loughman filed a class action (hereinafter referred to as "the Loughman action") in the United States District Court for the Western District of Pennsylvania against various railroad companies, coal companies, and others, alleging that the defendants had conspired to acquire the plaintiffs' real estate at prices below its actual value by misrepresenting their condemnation powers and by concealing the involvement of the defendant coal companies in the right-of-way acquisition and the construction of the rail line. The Loughman action wound its way through

the litigation process for several years, during which the issue of class certification remained unresolved. The plaintiffs did not move for class certification, nor did the defendants seek to have the class action aspects of the case dismissed.

In the interim, on September 17, 1987, Petitioners filed the present action in the United States District Court for the Western District of Pennsylvania. The district court had subject-matter jurisdiction pursuant to 18 U.S.C. § 1964(c) and 28 U.S.C. § 1331. Petitioners were members of the class in the Loughman action, and Respondents in the present action are the same entities and individuals named as defendants in the Loughman action. The basis for Petitioners' claims was exactly the same as that in the Loughman action (i.e., that

Respondents had conspired to acquire Petitioners' real estate at prices below its actual value by misrepresenting Respondents' powers and by concealing the involvement of the Respondent coal companies in the right-of-way acquisition and the construction of the rail line), and the theories of relief were the same (alleged violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 et seq.; 42 U.S.C. § 1983; and Pennsylvania common law).

Thereafter, the plaintiffs in the Loughman action moved for class certification. The district court denied the motion for class certification in December 1988.

Thereafter, Respondents in the present action moved for summary judgment. They contended that because the underly-

ing events occurred from late 1981 through June 1982, Petitioners' RICO and § 1983 claims were barred by the applicable four-year and two-year statutes of limitations, respectively. Petitioners pointed out to the district court that, under American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), the statute of limitations had been tolled from the filing of the Loughman action until class certification was denied in the Loughman action in December 1988, thereby making the September 1987 filing of the present action timely.

The district court, however, held that the application of the American Pipe doctrine was limited by Local Rule 34(c) for the United States District Court for the Western District of Pennsylvania, which requires plaintiffs in class actions to move for class certification

within 90 days after the filing of the complaint. In an opinion filed on June 18, 1990, the court reasoned that the Loughman plaintiffs' failure to move for class certification within the deadline set forth by Local Rule 34(c) was a de facto abandonment of the class action. The court therefore held that the statute of limitations was tolled only for the 90 days allotted by Local Rule 34(c)--from April 1983, when the Loughman action was filed, until October 1983. 740 F. Supp. at 1133; Appendix at A-31 to A-33. (Having determined that Petitioners' federal claims should be dismissed, the court declined to exercise pendent jurisdiction over the state law claims.) On that basis, the court granted Respondents' motion for summary judgment.

Petitioners filed a timely appeal to the United States Court of Appeals for

the Third Circuit pursuant to 28 U.S.C. § 1291. On September 24, 1991, the Third Circuit affirmed the district court's ruling without opinion.

ARGUMENT

THE DISTRICT COURT'S APPLICATION OF LOCAL RULE 34(C) IMPERMISSIBLY ERODES THIS COURT'S RULING IN AMERICAN PIPE.

More than eight years have elapsed since this Court last considered the parameters of American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974). See Chardon v. Fumero Soto, 462 U.S. 650 (1983); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983). The instant case not only offers the opportunity but creates the necessity of doing so once again.

The American Pipe decision rested on three considerations: (1) fairness to the defendants, (2) fairness to the ab-

sent class members, and (3) optimization of judicial economy. This Court reasoned that defendants would not be harmed by tolling the statute of limitations pending a determination of class action certification because, by virtue of the class action allegations, these defendants are placed on notice of the claims against them and of the generic identities of the claimants. 414 U.S. at 554-55. Furthermore, to bar individual actions by absent class members because they had relied on class relief would unfairly punish them for having failed to anticipate the denial of class action certification. Id. at 553-54. Finally, because absent class members would otherwise be forced to file individual claims in order to protect their interests in the event class action status were later found unsuitable, this Court concluded

that a tolling of the statute of limitations until a ruling on the propriety of class relief was essential in order to prevent a needless proliferation of lawsuits. Id.

The district court's ruling in the case at bar undermines the purpose of the American Pipe doctrine. The district court suggested that Respondents somehow "relied" on the Loughman plaintiffs' failure to move for class certification in accordance with Local Rule 34(c) as an abandonment of the class aspects of the case. 740 F. Supp. at 1133; Appendix at A-31 to A-32. However, there are three serious flaws in this logic. First, as will be pointed out below, it is widely agreed that the mere failure by a plaintiff to move for class certification as required by local rules of court is not an abandonment of the class action. Con-

sequently, any supposed reliance on this erroneous notion was, as a matter of law, unreasonable.

Second, Respondents could not have "relied" on the Loughman plaintiffs' failure to seek class certification, for there was nothing Respondents could have done, and hence nothing they refrained from doing, to make Petitioners' claims in the present suit any less timely. Respondents may have incorrectly assumed that the class aspects of the case had been abandoned, therefore, but in no meaningful sense did they rely on that assumption.

Third, if Respondents truly believed that the Loughman plaintiffs' failure to comply with Local Rule 34(c) was a complete bar to class certification, then they should have moved to dismiss the class action allegations instead of al-

lowing the issue to dangle in limbo. In Boring v. Medusa Portland Cement Co., 63 F.R.D. 78 (M.D. Pa.), aff'd without opinion, 505 F.2d 729 (3d Cir. 1974), for example, the defendants opposed a motion for class certification on the ground that the plaintiffs had not filed the motion until 17 months after the action was begun. The court rejected this argument, holding that "[i]n order to avoid any prejudice to themselves, the defendants were free to petition the court on the issue of certification." 63 F.R.D. at 80.

The district court never suggested, nor will the record support, that Respondents were unaware that class members such as Petitioners had claims against them. Furthermore, since the nature and theory of the claims in both the Loughman action and the present case are the same,

it is clear that Respondents knew the nature of Petitioners' claims. To apply the American Pipe doctrine in the present context thus is eminently fair to Respondents.

To limit American Pipe as the district court did below, on the other hand, is eminently unfair to absent class members such as Petitioners. This Court reasoned in American Pipe that absent class members should not be forced at their peril to hazard a guess concerning the viability of the class action, and that they accordingly should be allowed to wait until class certification is denied before the statute of limitations recommences. The district court's ruling below assumes that the expiration of the deadline imposed by a local rule is equivalent to a court order denying class

certification. That equivalence simply does not exist.

The lower courts have held that the mere failure of a named plaintiff to move for class certification within the deadline specified by a local rule is not by itself a reason to deny certification. E.g., McGowan v. Faulkner Concrete Pipe Co., 659 F.2d 554, 559 n.3 (5th Cir. 1981). As the Manual on Complex Litigation § 30.11 n.5 (2d ed. 1985) points out, the deadlines imposed by local rules may allow far less time than is "practicable" under Fed. R. Civ. P. 23(c)(1).

Thus, in decision after decision, courts have declined to deny class certification on the basis of the named plaintiff's having failed to comply with the deadlines specified in local rules. E.g., Gibb v. Delta Drilling Co., 104 F.R.D. 59, 76 (N.D. Tex. 1984); Weinberg

v. Lear Fan Corp., 102 F.R.D. 269, 271 (S.D.N.Y. 1984); Zeltser v. Hunt, 90 F.R.D. 65, 66 (S.D.N.Y. 1981); Brown v. J.P. Allen Co., 79 F.R.D. 32, 34 (N.D. Ga. 1978); Sanders v. Lum's, Inc., 76 F.R.D. 1, 2-3 (S.D.N.Y. 1976); Gilensky v. Columbia University, 62 F.R.D. 178, 179 (S.D.N.Y. 1974); Sheridan v. Liquor Salesmen's Union, Local 2, 60 F.R.D. 48, 50-51 (S.D.N.Y. 1973).

In Gray v. Greyhound Lines, East, 545 F.2d 169, 173 n.11 (D.C. Cir. 1976), the district court had dismissed the class allegations because of the plaintiffs' failure to seek certification within the time established by local rules. Reversing, the court of appeals characterized this dismissal as "unusual":

> The District Court's decision to dismiss the class allegations solely because of plaintiffs' failure to file a

> timely motion for certification, and without any consideration of the factors made relevant by Rule 23(b), Fed.R. Civ.P., is unusual. . . . It is not clear that dismissal of the class allegations for failure to comply with the local time limit is consistent with Rule 23(c)(1), Fed. R.Civ.P., which may require the court to determine the merits of the claim to representative status.

Id. at 173 n.11 (citations omitted); accord 2 H. Newberg, Newberg on Class Actions § 7.13 at 27-28 (2d ed. 1985) ("most courts ruling on the issue [whether failing to comply with local deadlines precludes class certification] have decided that the failure to file on a timely basis is not fatal to the class determination").

Ironically, a great many, if not the majority, of decisions certifying class actions despite the plaintiffs' failure to move for certification within the deadline imposed by local rules come from

federal district courts in Pennsylvania. See, e.g., Robert Alan Insurance Agency v. Girard Bank, 107 F.R.D. 271, 274 (E.D. Pa. 1985); Pabon v. McIntosh, 546 F. Supp. 1328, 1331-32 (E.D. Pa. 1982); Bernstein v. National Liberty International Corp., 407 F. Supp. 709, 714 (E.D. Pa. 1976); Muth v. Dechert, Price & Rhoads, 70 F.R.D. 602, 606-07 (E.D. Pa. 1976); Umbriac v. American Snacks, Inc., 388 F. Supp. 265, 272 (E.D. Pa. 1975); Lee v. North Penn Transfer, Inc., 15 Fed. R. Serv. 2d (Callaghan) 1405, 1406 (E.D. Pa. 1972).

Particularly noteworthy in this regard is a decision from the United States District Court for the Western District of Pennsylvania. In Slanina v. William Penn Parking Corp., 106 F.R.D. 419, 422 (W.D. Pa. 1984), the court certified a class action even though, as in the

Loughman action, the plaintiffs had not complied with Local Rule 34(c).

What significance, then, should absent class members attach to the expiration of a locally imposed certification deadline? In these circumstances, class certification may perhaps be denied, and perhaps not. The outcome depends upon whether there are extenuating circumstances justifying the delay, upon whether the defendants have been prejudiced, and, in general, upon whether certification conforms to the "as soon as practicable" standard of Rule 23(c)(1). The result is not automatic, as the district court below assumed. Rather, it turns upon "subtle factors" not easily evaluated by absent class members. American Pipe & Construction Co. v. Utah, supra, 414 U.S. at 553.

The district court's ruling was thus prejudicially unfair, not only to Petitioners but also to absent class members in class actions across the board. The ruling was unfair to Petitioners because it punished them for lacking the clairvoyance to anticipate that the district court would take the literally unprecedented position of holding that the class action aspects of the Loughman action had been automatically dismissed, without any court order to that effect, back in October 1983 when the 90-day deadline set by Local Rule 34(c) expired.

More importantly, the ruling will penalize absent class members in other cases. And that is what makes the present case "certworthy"--not simply the magnitude of error, which is immense, nor even the prejudice to Petitioners. Although both of these factors combine to

raise an issue deserving of review by this Court, the additional implications for class actions generally demand that this Court intervene to correct the situation.

Consider the significance of the district court's ruling for absent class members in other cases. The very fact that such a ruling exists, and has not been reversed, creates the danger that in any given future case a court might issue a similar ruling. Faced with the risk that the expiration of the local deadline might later be construed as recommencing the statute of limitations, absent class members would have no choice but to file individual actions or motions to intervene. They could no longer afford to wait, as American Pipe allowed them to do, for a court order granting or denying class action certification. The result-

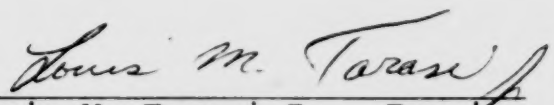
ing deluge of additional litigation is, of course, the very evil which this Court sought to avoid in American Pipe. See 414 U.S. at 553-54.

CONCLUSION

With a stroke of the pen (or, in this computerized era, a strike of the font) the court below has for all practical purposes overruled American Pipe. While this Court's holding remains on the books, it no longer offers any protection to absent class members in those district courts which have local rules requiring motions for certification to be brought within a specified time. In order to restore the vitality of American Pipe, Pe-

titioners urge this Court to issue a writ of certiorari.

Respectfully submitted,



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APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARLENE ANDERSON and THOMAS ANDERSON, Plaintiffs,	:	
vs.	:	Civil Action
CONSOL PENNSYLVANIA COAL COMPANY et al., Defendants.	:	No. 87-1962 Consolidated with Nos. 87-1963, 87-1964, 87-1965, 87-1966, 87-1967, 87-1970, 87-1971

OPINION

SMITH, District J.

These eight consolidated cases arise from the acquisition of a right of way in Greene and Washington counties, Pennsylvania, on which defendants built a railroad line in or about 1982-83. These cases are related to another set of eight consolidated cases, Loughman, et al., Consol Pennsylvania Coal Co., et al., Civil Action Nos. 83-921, 83-1674 through

83-1679, and 83-1754 (the "Loughman cases") which recently were retried to verdict before this Court. In all sixteen cases, plaintiffs allege that defendants conspired to acquire plaintiffs' real estate at lower than its "true value" by misrepresenting their condemnation powers and by concealing the involvement of the defendant coal companies in the right-of-way acquisition and construction of the rail line.[1]

Defendants are several coal companies,[2] The Monongahela Railway Company, The Upshur Agency, which is a land com-

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[1]The Honorable Hubert I. Teitelbaum held in the Loughman cases, by Order of August 6, 1986, that defendant Monongahela Railroad had the power to condemn properties for purposes of building the railway spur to the Bailey Mine, regardless of the coal companies' involvement in the project.

[2]Consol-Pennsylvania Coal Company, Consolidation Coal Company, Consol-Land Development, Rheinische Braunkohlenwerke, A.G., Maria Theresa Bergbaugesellschaft, Rheinbraun U.S.

pany, various landsmen employed by Upshur, Ewing Pollock, an attorney, and Pollock, Pollock and Thomas, his Washington, Pennsylvania law firm. The coal company defendants had entered into a joint venture to develop the Bailey Mine, part of which project involved the construction of a railroad to transport coal from the mine to market. There is no dispute that the coal company defendants entered into an agreement with Monongahela that they would finance the construction of the railroad spur, including the cost of acquiring the right of way. The defendant landsmen were hired by some of the defendants to acquire a right-of-way for a railroad spur to be built from Waynesburg, Pennsylvania to the Bailey Mine. The Loughman and Anderson plaintiffs allege that a conspiracy was formed to have the landsmen make misrepresenta-

tions to plaintiffs concerning the land acquisitions.

The Loughman cases were filed in April and July, 1983. They meandered through the litigation process until they were tried to verdict, first before the Honorable Hubert Teitelbaum in early 1987, and on retrial by this Court in March, 1990. A multimillion dollar verdict was returned by the jury in the first trial; approximately six months later, the eight complaints in the above-captioned lawsuits (the "Anderson cases") were filed.

In these cases, the Anderson plaintiffs allege that defendants' conduct violated the Racketeer Influenced and Corrupt Organization Act ("RICO"), 42 U.S.C. § 1983 ("Section 1983") and Pennsylvania common law.[3] Presently before

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[3]The Loughman plaintiffs alleged violations of RICO and common law. This court granted judgment notwithstanding

us are three dispositive motions: Defendants' Motion for Summary Judgment and Plaintiffs' Motion for Summary Judgment,[4] and Plaintiffs' Motion for Partial Summary Judgment.

The Supreme Court has explained the standard for evaluating summary judgment motions in Celotex Corp. v. Catrett, 477 U.S. 317, 322, 323-24 (1986):

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party

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the verdict on the RICO claims by Order of March 1, 1990, on grounds that plaintiffs had failed to prove a pattern of racketeering under the guidelines set forth by the United States Supreme Court in H.J. Inc. v. Northwestern Bell Telephone, ___ U.S. ___, 109 S.Ct. 2893 (1989).

[4]Citing the applicable statute of limitations, defendants contend they are entitled to judgment as a matter of law because plaintiffs' federal claims are untimely. Plaintiffs' motion for summary judgment is in essence an answer to defendants' timeliness argument. Because they raise the same issue, we will address defendants' and plaintiffs' summary judgment motions together.

> who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.
>
> * * *
>
> One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose. (footnote omitted).

In Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the Court further explained the plaintiff's burden in the summary judgment context:

> The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252.

A. Defendants' Motion for Summary Judgment

Defendants seek summary judgment on plaintiffs' RICO and civil rights claims

on grounds that they are barred by the relevant statutes of limitations. Alternatively, defendants attack these claims on sufficiency grounds. Finally, defendants urge us to dismiss plaintiffs' pendant [sic] state law claims on abstention grounds. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (where all federal claims are dismissed before trial, state claims should be dismissed as well).

1. The RICO claims

The Anderson complaints were filed in September 1987, and concern events surrounding land transactions occurring from late 1981 through June, 1982. The elements of a RICO claim are: 1) the conducting of 2) an enterprise, 3) through a pattern, 4) of racketeering activity. A private plaintiff also must show that he has been injured in his business or property by the violative

conduct to establish standing. Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1128 (3d Cir.1988). Here, plaintiffs have alleged that defendants ". . . used a telephone and/or U.S. Mail . . . as part of a pattern of racketeering activity engaged in fraudulently forcing individuals to sell their property for below its true market value." Anderson Complaint, ¶ 67; Gensler Complaint, ¶ 67; Deiteich Complaint, ¶ 67; Reese Complaint, ¶ 65; Grable Complaint, ¶ 67; Stoner Complaint, ¶ 67; Eisiminger Complaint, ¶ 68; Huffman Complaint, ¶ 66.[5]

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[5]Although these paragraphs of the Complaints generally allege that predicate acts of wire and mail fraud occurred and further direct the Court back to previous paragraphs of the same pleading for specific examples of such acts, there are no specific allegations of such acts in the Complaints. Because defendants have not challenged the viability of the Complaints on these grounds, however, we will proceed by assuming for purposes of the motions before us that plaintiffs can make an evidentiary showing of predicate acts sufficient to overcome a motion for failure to state a claim.

a. Statute of Limitations

RICO claims are subject to a four-year statute of limitations. Agency Holding Corp. v. Malley-Duff & Assoc., Inc., 483 U.S. 143 (1987), aff'g in part, rev'ing in part, Malley-Duff & Assoc., Inc. v. Crown Life Insurance Co., 792 F.2d 341 (3d Cir.1986). Defendants urge us to examine the four years immediately preceding the filing date of plaintiffs' complaints, i.e., September 17, 1983 through September 17, 1987, and to determine that all alleged predicate acts and injuries occurred prior to the commencement of this period.

Plaintiffs advance three arguments for not applying the four-year statute of limitations. First, they contend that the statute of limitations was tolled by the filing of a class action in the Loughman cases. Second, they argue that applying the four-year statute consti-

tutes a retroactive application of precedent which would be improper under the circumstances. Third, they allege that equitable tolling is appropriate due to defendants' alleged fraudulent concealment of the facts.

i. Application of Malley-Duff

Taking plaintiffs' second argument first, plaintiffs argue that under the analysis set forth in Chevron Oil v. Huson, 404 U.S. 97 (1971), we should not apply the four-year statute of limitations adopted in 1987 by the Supreme Court in Malley-Duff to these cases, but rather that we should apply the six year limitations period used before Malley-Duff.[6] Plaintiffs conveniently ignore

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[6]The three qualifications for applying a precedent prospectively only are:

> 1) The holding must establish a new principle of law, either by overruling clear past precedent on which litigants may have re-

the fact that Malley-Duff predates the filing of the Anderson cases; thus, it was the law at the time plaintiffs filed their claims. Accepting arguendo that Malley-Duff should be applied prospectively only, plaintiffs' claims are still subject to a four-year limitations period.

> lied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;
>
> 2) The merits and demerits in each case must be weighed by looking to the history of the rule in dispute, its purpose and effect, and whether retrospective operation will further or retard the rule's operation;
>
> 3) Retrospective application must create the risk of producing substantially inequitable results.

Hill v. Equitable Trust Co., 851 F.2d 691, 696 (3d Cir. 1988), (citing Chevron Oil Co. v. Huson, 404 U.S. at 106-07 (1981)), cert. denied, Data Controls North, Inc. v. Equitable Bank Nat. Ass'n., 109 S.Ct. 791 (1989).

ii. The Timing of Defendants' Predicate Acts

Plaintiffs next contend that the statute of limitations is irrelevant because defendants are still committing predicate acts. The conduct cited by plaintiffs in support of this argument does not constitute conduct prohibited by RICO, however. For instance, plaintiffs cite the failure of the railroad to pay property taxes on the right-of-way and the coal companies' challenge to Greene County's attempt to assess such property taxes against them. Plaintiff's [sic] Brief in Opposition to Defendants' Motion for Summary Judgment at 32-33.

We cannot agree with the plaintiff's [sic] characterization of defendants' involvement in the property tax dispute as a predicate act under either the law or under plaintiffs' theory of the case. In the pleadings, plaintiffs alleged that defendants' racketeering activity con-

sisted of "fraudulently forcing individuals to sell their property for below its true market value" by means of the United States mail and the telephone, thereby invoking the mail and wire fraud provisions of the definition of racketeering activity as set forth in 18 U.S.C. § 1961. E.g., Anderson Complaint, ¶ 67. Defendants' tax dispute following the property sale is not conduct addressed in the complaint as part of a racketeering scheme, and we will not allow plaintiffs to expand their theory of the case at this late date in an effort to avoid summary judgment. The alleged tax dispute has no connection to plaintiffs' property sale, nor does it create a cognizable injury for plaintiffs.

Plaintiffs have made no showing nor have they articulated a theory which supports a finding that any predicate acts or injuries arising therefrom have oc-

curred since the last land transaction in June, 1982.[7] Plaintiffs have identified no subsequent acquisition of property by defendants or representations via mail or wire by defendant landsmen concerning the railroad's power and intention to condemn plaintiffs' property in the complaint.

Accordingly, we find that the evidence indicates that the last injury occurred in ar about mid-1982 when the railroad acquired the last piece of property in the right of way to the Bailey mine.

iii. The Timeliness of the RICO Claims

Having determined that the four year statute applies and that there has been no showing of predicate acts or injuries

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[7]Plaintiffs have set forth the closing dates for each of plaintiffs' properties which indicate that the acquisition period for these plaintiffs spanned from October 20, 1981 to June 15, 1982. Plaintiffs' Brief at 28 n.10.

occurring after June 15, 1982, we turn to the question of timeliness under current law in this Circuit. Our court of appeals has held that in a RICO action involving multiple victims, plaintiffs' claims are timely if they are filed within four years of discovery of the elements of the claim, or within four years of discovery of the last injury.

The Court of Appeals for the Third Circuit announced the accrual rule for RICO claims in Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1126 (3d Cir. 1988):

> The rule which we announce provides that the limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of a civil RICO cause of action existed, unless, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern. In that case, the accrual period shall run from the time when the plaintiff knew or should

> have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same 'pattern.'

A potential claimant's knowledge of the factual elements, not the legal significance of those elements, is all that is necessary for accrual to occur. 863 F.2d at 1127-28.

Defendants correctly contend that under the Keystone rule, this court must look at whether plaintiffs knew or should have known of their claims before September 17, 1983. Defendant's Brief in Support of Summary Judgment at 14. Based on the uncontroverted evidence presented to us, we find that plaintiffs Reese, Stoner and Gensler had actual notice of their claims before that date. According to their own deposition testimony, plaintiffs Reese and Stoner at the very least before or about April, 1983 (when the

Loughman cases were first filed) knew not only the elements of their claims but also that other neighboring landowners were contemplating or in fact bringing suit. Transcript of Deposition Testimony of R.J. Reese at 81; Transcript of Deposition Testimony of C. Stoner at 48-49 (found at Exhibit III, items 1, 3 of the Affidavit of Peters S. Wellington, Esquire ("Wellington Affidavit"), Docket # 53).

Likewise, Plaintiff Gensler admits in his affidavit that he saw a newspaper article dated October 2, 1982, which referred to defendant Consolidation Coal Company's construction of a railroad spur for its Manor Mine Complex. Affidavit of Frances I. Gensler (Docket # 73), ¶ 4 (referring to Exhibit II, document no. 6, of the Wellington Affidavit). Therefore, we will grant summary judgment in favor of defendants on the RICO claims in Civil

Action Nos. 87-1963, 87-1965, and 87-1968.

With regard to the remaining plaintiffs, under the Keystone rule we are left to determine when they knew or should have known of the claims against them. This inquiry poses a significant problem. Although plaintiffs deny having received adequate notice at the time they sold their property due to alleged fraud, they have failed to produce any evidence to that effect.[8] Instead, plaintiffs have argued in their opposition to summary judgment that the theory of fraudu-

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[8]The following dates are identified in plaintiffs' respective complaints as the date each of them discovered defendants' alleged misrepresentations: Anderson, October 25, 1985 (Complaint, ¶ 49); Gensler, January 15, 1987 (Complaint, ¶ 39); Deiteich, August, 1986 (Complaint, ¶ 39); Reese, June, 1987 (Complaint, ¶ 37); Grable, March, 1987 (Complaint, ¶ 39); Stoner, March, 1987 (Complaint, ¶ 39); Eisiminger, April, 1987 (Complaint, ¶ 36); Huffman, February, 1987 (Complaint, ¶ 38).

lent concealment works to extend the limitations period in these cases.

Admissions by plaintiffs Reese, Stoner, and Gensler of actual notice undercut any equitable theories of tolling advanced by their counsel in briefs. Hobson v. Wilson, 737 F.2d 1, 35 (D.C. Cir. 1984) ("The doctrine of fraudulent concealment does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim"), cert. denied, Brennan v. Hobson, 470 U.S. 1084 (1985). As for the remaining plaintiffs, they must make some showing of affirmative misconduct by defendants at this stage of the proceeding to extend the limitations period. See Riddell v. Riddell Washington Corp., 866 F.2d 1480, 1491 (D.C. Cir. 1989) (defendants next meet stringent standard when plaintiffs have shown affirmative miscon-

duct by defendant; Moore v. Farley, RICO Bus. Disp. Guide 7236 (W.D. Pa. 1989) (Bloch, J.). Given the nature of the tolling argument, it is incumbent on each plaintiff to come forth with some evidence sufficient to create a genuine issue of fact in their case on the fraudulent concealment issue. It is well established that a plaintiff may not rely merely on the allegations of his pleadings for this purpose. Anderson, 477 U.S. at 256.

We find that plaintiffs have not made an affirmative showing of fraudulent concealment concerning the claims of Anderson, Dietrich, Grable, Huffman, or Eisiminger. Plaintiffs have filed six affidavits in support of their fraudulent concealment argument; however, three of these affidavits, i.e., Elizabeth T. Stevenson (Docket #70), Louis Tarasi (Docket # 71), and Joseph Hinchliffe (Docket #

72), are insufficient as a matter of law and cannot be considered by this court.[9]

Stevenson's affidavit fails to establish the basis on which she would have personal knowledge of and be competent to testify to the matters contained therein. Hurd v. Williams, 755 F.2d 306, 308 (3d Cir. 1985). In fact, to the contrary, her only knowledge apparently is derived from a document produced by a third party during discovery and, for purposes of this motion, must be disregarded as hearsay. Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980) (affidavit must be based on personal knowledge and be devoid of hearsay), aff'd w/o op., 659 F.2d 1065 (3d Cir. 1981).

Tarasi's affidavit represents that certain exhibits are true and correct

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[9]Messrs. Tarasi and Hinchliffe are counsel of record for plaintiffs; Ms. Stevenson is an employee of the Tarasi law firm.

copies of documents produced by a third party. However, no documents are attached to the affidavit for the court's review, nor are the documents specifically identified by the affidavit. Yet even had Tarasi's affidavit been filed in its completed state, we fail to see how third party documents would be anything other than hearsay when offered in this fashion.

Finally, Hinchliffe's affidavit explains the process undertaken to obtain admissible affidavits from plaintiffs. Hinchliffe represents that as of March 30, 1989, he had been unable to collect all of plaintiffs' affidavits, but further represents what such affidavits would have attested to had they been available. Not only do we find that Hinchliffe's prediction of his clients' testimony is insufficient for purposes of avoiding summary judgment, we also note

that more than a year later only two of plaintiffs' affidavits have been filed.

The remaining three affidavits, i.e., Eisiminger (Docket # 73), Gensler (Docket # 74), and David C. Hook, Esquire (Docket # 75), are not helpful. Eisiminger's asserts merely that he believed "what" defendant Wilson told her; unfortunately, Eisminger does not define for the Court the content of her conversations with Wilson, and the affidavit is unhelpful for that reason. Gensler's affidavit establishes that he had actual notice of his claims as early as 1982, as explained above. Hook's affidavit refers to his dealings with defendants on behalf of a nonparty, Sarah Closser, and also attests to the status of property tax assessments for the properties acquired by Monongahela for the Manor railroad tract project. We fail to see how these matters raise any issue of fact concerning

the claims of the Anderson plaintiffs, or their alleged failure to discover said claims until over five years after the last land acquisition.

Plaintiffs have not presented us with any admissible evidence which raises a genuine issue of fact on the crucial issue of notice. Clearly, plaintiffs would bear the burden at trial of proving that their claims are timely and, absent even a minimal showing of evidence to that effect at this juncture, we must find that their RICO claims are untimely. In doing so, we are mindful of the admonition that "[l]imitations issues . . . ordinarily require factual determinations and are best left to trial for resolution." Kroungold v. Triester, 407 F. Supp. 414, 419 (E.D. Pa. 1975). In these cases, however, plaintiffs' total failure to produce any admissible evidence in support of their tolling theory, and

their inability to support a theory of subsequent predicate acts or injuries therefrom leads us to the inevitable conclusion that these are cases best disposed of by the summary judgment mechanism provided in Rule 56.

We emphasize that our decision on the timeliness of the RICO claims is based on plaintiffs' failure to produce evidence, and not on defendants' theory of constructive notice. Defendants contend that certain plaintiffs were on notice of their injuries by virtue of the widespread media coverage of events leading up to and involving the Bailey Mine project. In support, defendants cite two volumes of approximately 75 newspaper articles appended to the Wellington Affidavit, as well as various plaintiffs' deposition testimony to the effect that they subscribe to the local newspapers.

Had plaintiffs made the necessary evidentiary showing of defendants' fraudulent concealment, defendants' argument would not have been adequate rebuttal:

> [W]hen plaintiff shows that defendants committed affirmative acts of concealment with respect to a potential claim, defendants must meet a more stringent standard to bar a plaintiff on the ground that he was on notice of his claim notwithstanding the defendants' attempt to conceal it. [citation omitted] Specifically, a defendant who has engaged in fraudulent concealment, in order to make out a defense based on the plaintiff's lack of due diligence, must show something closer to actual notice than the merest inquiry notice that would be sufficient to set the statute of limitations running in a situation untainted by fraudulent concealment.

Riddell v. Riddell Washington Corp., 866 F.2d at 1491. See also, Hobson v. Wilson, 737 F.2d at 35 ("We do not mean the kind of notice--based on hints, suspicions, hunches or rumors--that requires a plaintiff to make inquiries in the exer-

cise of due diligence, but not to file suit").

iii.[sic] Tolling

Finally, we will address briefly plaintiffs' other tolling theories. Regarding alleged tolling by the existence of a class action in Loughman, a review of the record confirms that the original complaint in the Loughman cases, filed on behalf of Ms. Loughman only on April 19, 1983, contained class action allegations. Thereafter, in July, 1983, Loughman's counsel (who also is counsel for plaintiffs in this matter) filed complaints on behalf of the remaining seven Loughman plaintiffs, which complaints lacked any class allegations. At about the same time, an amended complaint repeating the class action allegations were filed on behalf of Ms. Loughman.

The eight Loughman cases were consolidated in August, 1983 and, more than a year and a half later, in April, 1985, plaintiffs' counsel filed a Third Amended Complaint on behalf of each plaintiff. None of the April, 1985 amended complaints contained class action allegations. This Court denied plaintiffs' Motion for Class Certification in December, 1988, citing plaintiffs' failure to comply with Local Rule 34.[10]

Plaintiffs cite Crown, Cork & Seal Co. v. Parker, 462 U.S. 345 (1983) and American Pipe & Constr. Co. v. Utah, 414 U.S. 538 (1974), in support of their theory that commencement of a class action in Loughman tolled the limitations period as to the plaintiffs in the Anderson cases. The teaching of these cases is that tolling is appropriate when the

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[10]Local Rule 34 requires a plaintiff to move for class certification within 90 days of filing the complaint.

filing of a class action suit provides to defendants adequate notice of the claims being brought against them and of the potential plaintiffs who may participate in the resulting judgment.[11] Crown, Cork, 462 U.S. at 353; American Pipe, 414 U.S. at 555.

The facts in the instant case differ from the situation in Crown Cork and American Pipe because of the existence of Local Rule 34. In this district, the burden to move in a timely fashion for either class certification or an extension of time for class certification is placed squarely on plaintiff by operation

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[11]As Justice Powell's concurrence emphasizes, notice is the basis for the Crown, Cork rule; therefore, a plaintiff is not allowed to assert tolling for claims that differ from those asserted in the original class suit. 462 U.S. at 354-55. The Anderson plaintiffs may not benefit from any tolling on their civil rights claims, therefore, due to the absence of such claims from the original Loughman complaint.

of Local Rule 34.[12] Defendants reasonably relied upon the Loughman plaintiffs' failure to move for class certification as required by the local rules as abandonment of the class action.

The Court has cautioned against reading the tolling rule in such a way

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[12]Subsection (c) of Local Rule 34 provides:

> Within 90 days after the filing of a complaint in a class action, unless this period is extended on motion for good cause appearing, the plaintiff shall move for a determination under subdivision (c)(1) of Rule 23, Federal Rules of Civil Procedure, as to whether the case is to be maintained as a class action. In ruling upon such a motion, the Court may allow the action to be so maintained, may disallow and strike the class action allegations, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where it is held that the determination should be postponed, a date will be fixed by the Court for renewal of the motion before the same judge.

which would allow abuse by class members, Crown, Cork, 462 U.S. at 354 (Powell, concurring), and we find that applying that rule here would permit plaintiffs to take unfair advantage of defendants' reliance on the local rules. Therefore, we find that the statute of limitations was tolled, if at all, only for the six months from April, 1983 until October, 1983.

Plaintiffs have made various other arguments for tolling, but they were wholly unsupported by the record and are made with disregard to plaintiffs' burden to come forward with an evidentiary showing. For instance, plaintiffs assert that defendants altered documents to conceal the coal companies' involvement with the railroad project but fail to produce (or cite) a shred of evidence to that effect. Similarly, plaintiffs suggest that defendants' denial of liability during

the Loughman litigation supports tolling of the statute, but as a matter of law the time limit for filing suit is not extended by reason of the adversary's refusal to agree that the claim is valid. Firestone & Parson, Inc. v. Union League of Phil., 672 F. Supp. 819, 822 (E.D. Pa.), aff'd w/o op., 833 F.2d 304 (3d Cir. 1987).

b. Sufficiency of the RICO claims

In light of our determination that plaintiffs' RICO claims are untimely, we need not reach the question of their sufficiency. We note, however, that given plaintiffs' failure to make an evidentiary showing of the alleged misrepresentations made by defendants, plaintiffs have not established a prima facie case of the RICO violations. Nor can we find, without admissible evidence concerning the content of the alleged representa-

tions, that such misrepresentations are material or that plaintiffs' reliance on such misrepresentations are justifiable.[13]

2. Plaintiffs' Civil Rights Claims

a. Statute of Limitations

For plaintiffs' Section 1983 claims, we must adopt the statute of limitations of the most analogous state law cause of action. Wilson v. Garcia, 471 U.S. 261, 276 (1985). Plaintiffs have alleged in general that they have been deprived of their due process and equal protection rights by defendants' conduct, and in particular that their property was taken

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[13]We also question whether the Anderson cases, like their Loughman counterparts, fail to present a pattern of racketeering activity sufficient to pass muster under the continuity requirement of RICO, as defined by the Supreme Court in H.J. Inc. v. Northwestern Bell Telephone, ___ U.S. ___, 109 S.Ct. 2893 (1989).

in violation of their due process rights. E.g., Anderson complaint, ¶¶ 103-06.

Pennsylvania's residual statute for actions or proceedings "to recover damages for injury to person or property, which is founded on negligent, intentional, or otherwise tortious conduct" is two years, as codified at 42 Pa. Cons. Stat. § 5524(7) (Purdon Supp. 1990). For the reasons set forth above, we find that plaintiffs have failed to make any showing that they filed within two years of the accrual of their civil rights claims.

b. Sufficiency of Civil Rights Claims

Even if plaintiffs' Section 1983 claims were timely, we find they are insufficient as a matter of law. To set forth a cause of action under 42 U.S.C. § 1983, a plaintiff must show at least two elements. First, a plaintiff must show that the defendant deprived plaintiff of

a right secured by the Constitution or the laws of the United States. Second, plaintiff must prove that the defendant acted under color of state law. Plaintiff bears the burden of proof on both of these issues. Parratt v. Taylor, 451 U.S. 527, 535 (1981).

In these cases, defendants are purely private parties. Plaintiffs do not allege that defendants commenced condemnation proceedings or any other formal action against them which would convert their conduct into state action. Even if defendants had commenced such proceedings, a private party is not transformed into a state actor because the state acts on its recommendation or motion. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

3. Pendent State Claims

Having determined that summary judgment on the federal claims in these cases is appropriate, we decline to retain pendent jurisdiction with respect to the remaining state law claims.

> If it appears that the federal claim is subject to dismissal under Fed.R.Civ.P. 12(b)(6) or could otherwise be disposed of in a motion for summary judgment under Fed.R.Civ.P. 56, then the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances.

Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976) (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966)). Accord Cito v. Bridgewater Township Police Dept., 892 F.2d 23, 26 (3d Cir. 1989). There are no extraordinary circumstances present in these cases; we decline to exercise pendent jurisdiction over plaintiffs' state law claims.

B. Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs have filed a Motion for Partial Summary Judgment seeking this Court's determination that defendant Monongahela Railroad did not have the power of condemnation as to plaintiffs' properties. As noted above, this question already was addressed by the Honorable Hubert I. Teitelbaum during the Loughman litigation by Order dated August 6, 1986 (Civ. No. 83-921, Docket # 272). The court determined that defendant Monongahela had the afore-mentioned condemnation power. Although plaintiffs attempt to relitigate the issue in this second set of related cases, they have not presented any reason to deviate from the reasoning in the Loughman cases. We will adopt Judge Teitelbaum's reasoning in denying plaintiffs' Motion for Partial Summary Judgment.

CONCLUSION

For the foregoing reasons, summary judgment is granted in favor of defendants and against all plaintiffs on the federal claims in the complaints. We decline to exercise pendant [sic] jurisdiction over the state law claims.

An appropriate order follows.

BY THE COURT,

DATE: June 18, 1990

_____/s
D. Brooks Smith
United States
District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MARLENE ANDERSON and THOMAS ANDERSON, Plaintiffs,	:	Civil Action
vs.	:	No. 87-1962
CONSOL PENNSYLVANIA COAL COMPANY et al., Defendants.	:	Consolidated with Nos. 87-1963, 87-1964, 87-1965, 87-1966, 87-1967, 87-1970, 87-1971,

ORDER

AND NOW, this 18th day of June, 1990, upon consideration of the defendants' motions for summary judgment and plaintiffs' motion for partial summary judgment, it is

ORDERED that defendants' motion is granted with respect to all counts of the complaints. It is further

ORDERED that the plaintiffs' motion for partial summary judgment is denied.

BY THE COURT,

_____/s
D. Brooks Smith
United States District Judge

cc: All Counsel of Record

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3486

MARLENE ANDERSON and THOMAS ANDERSON,
Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; MARIA THERESE VERKAUFSGESELLSCHAFT; and KARL NIXON;

No. 90-3487

ROBERT J. REESE and ELEANOR S. REESE,
Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; MARIA THERESE VERKAUFSGESELLSCHAFT; MIKE WILSON; and WILLIAM REESE;

No. 90-3488

IRENE M. GRABLE; STIDGER DUNN; CATHERINE DUNN; and DOROTHY E. VAN SCYOC;
Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; and MARIA THERESE VERKAUFSGESELLSCHAFT;

No. 3489

CHARLES A. STONER and DOROTHY STONER,
Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; and MARIA THERESE VERKAUFSGESELLSCHAFT;

No. 90-3490

RALPH T. EISIMINGER and LORETTA A. EISIMINGER,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; WILLIAM REESE; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; MARIA THERESE VERKAUFSGESELLSCHAFT; and MIKE WILSON;

No. 90-3491

ANDREW J. HUFFMAN, JR. and MARIE S. HUFFMAN,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; and MARIA THERESE VERKAUFSGESELLSCHAFT;

No. 90-3514

FRANCES I. GENSLER,

Appellant

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; and MARIA THERESE VERKAUFSGESELLSCHAFT;

No. 90-3515

KENNETH G. DIETREICH and ELEANOR DEITREICH,

Appellants

V.

CONSOL-PENNSYLVANIA COAL COMPANY, a corporation; RHEIN BRAUN U.S., a corporation; MONONGAHELA RAILWAY COMPANY, a corporation; DAVID BOGGS, an individual; EWING POLLOCK, an individual, and the law firm of POLLOCK, POLLOCK AND THOMAS; THE UPSHUR AGENCY, INC.; CONSOLIDATED COAL COMPANY; CONSOL-LAND DEVELOPMENT COMPANY; RHEINISCHE BRAUNKOHLENWERKE; and MARIA THERESE VERKAUFSGESELLSCHAFT;

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA
(D.C. Civil Action Nos. 87-01962, 87-01963, 87-01964, 87-01965, 87-01966; 87-01968, 87-01970, 87-01971)
District Judge: Hon. D. Brooks Smith

Argued January 28, 1991

Before: SLOVITER, Chief Judge, NYGAARD, Circuit Judge, and KATZ, District Judge[14]

JUDGMENT ORDER

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby AFFIRMED.

[14]Honorable Marvin Katz, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Costs taxed against appellants.

BY THE COURT

_____/s
Circuit Judge

Attest:

_____/s
Sally Mrvos, Clerk

Dated: Sept. 24, 1991

(2)

No. 91-1029

Supreme Court, U.S.
FILED
JAN 2 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARLENE ANDERSON et al.,

Petitioners,

vs.

CONSOL PENNSYLVANIA COAL COMPANY et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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January 2, 1992

QUESTION PRESENTED

The question presented is whether a frivolous class action complaint, later amended to delete all class action allegations, accompanied by seven complaints filed as independent actions and consolidated by the same attorneys, with respect to which those attorneys omitted to move for class certification for five years rather than within the 90 days prescribed by a valid district court rule, may have any tolling effect on the statute of limitations applicable to petitioners' claims?

Parties to the Proceeding

The petitioners are set forth in the caption of the petition.

The respondents joining in this brief are: Consol Pennsylvania Coal Company; Consolidation Coal Company; Consol Land Development Company; The Monongahela Railway Company; Rheinbraun U.S. Corporation; Rheinbraun A.G.; and Maria Theresia Bergbaugesellschaft mbH.

Other respondents in the proceedings below were David Boggs; Ewing Pollock; Pollock, Pollock and Thomas; The Upshur Agency, Inc.; Karl Nixon; Mike Wilson; and William Reese.*

---

* Pursuant to Rule 29.1, we advise the Court that the corporate respondents are owned as follows:

Rheinbraun U.S. Corporation is a subsidiary of Consol Energy, Inc. The latter is a subsidiary of Du Pont Energy Company, Rheinbraun A.G., and Rheinbraun U.S. GmbH. Du Pont Energy Company is a subsidiary of E.I. Du Pont De Nemours and Company.

Rheinbraun A.G. and Rheinbraun U.S. GmbH are subsidiaries of RWE AG.

Consolidation Coal Company is a subsidiary of Consol Energy Inc. Consol Land Development Company was merged into Consolidation Coal Company in 1987.

Consol Pennsylvania Coal Company is a subsidiary of Consolidation Coal Company.

Maria Theresia Bergbaugesellschaft is a subsidiary of Rheinbraun AG.

The Monongahela Railway Company is a subsidiary of Consolidated Rail Corporation.

The Upshur Agency, Inc., does not have a parent corporation.

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MISCELLANEOUS

3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶23.45[3] (2d ed. 1990) 4

No. 91-1029

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MARLENE ANDERSON et al.,

Petitioners,

VS.

CONSOL PENNSYLVANIA COAL COMPANY et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Introduction

These actions under the RICO statute, 18 U.S.C. §§1961-1968 (1988 & Supp. 1989), were filed on September 17, 1987, more than four years after petitioners knew, or should have known, of their claims; the claims were consequently time-barred. To escape the axe of the statute of limitations, petitioners invoke the *American Pipe* doctrine. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 552-53 (1974). That doctrine, as modified

in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983), holds that when a non-frivolous class suit is filed, but class action status is denied because the number of putative class members is too small, the filing of the original class suit tolls the running of any statute of limitations for such members until the court has found the suit inappropriate for class action status. Petitioners contend that a 1983 action filed in the Pittsburgh federal district, the so-called *Loughman* case, was such a class action, under which petitioners may take cover.

The District Court rejected the argument. Cautioned by Justice Powell that the *American Pipe* doctrine invites abuse, *see Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring), the District Court pointed out that Ms. Loughman had been erratic about maintaining her suit as a class action, and held that she disregarded important procedures established by a local court rule that required her to move in a timely manner to certify the class in order to give notice to her defendants (these respondents) that her suit was a class action. In short, the *Loughman* case was a frivolous class action, respondents reasonably relied on Loughman's failure to move for certification, and *American Pipe* was unavailable to petitioners to lift the bar of the statute.

The petition must therefore be denied because the case was rightly decided below. Moreover, the case is unimportant to the administration of federal justice because disposition of the petition turns on unique facts, peculiar to the procedural errors committed by Ms. Loughman.

The Facts

The petition omits and distorts inconvenient facts. In accordance with Sup. Ct. R. 15.1, the facts must be restated.

On June 22, 1987, this Court held that a four-year statute of limitations applied to actions founded on alleged violations of the RICO statute, 18 U.S.C. §§1961-1968 (1988 & Supp. 1989); *Agency Holding Corp. v. Malley-Duff & Assoc. Inc.*, 483 U.S. 143 (1987). Three months later, on September 17, 1987, these eight actions (the "*Anderson Cases*") were filed, severally, in the

United States District Court at Pittsburgh. Federal question jurisdiction, 28 U.S.C. §1331 (1988), was founded on alleged violations of the RICO statute predicated on frauds said to have been perpetrated by respondents to induce petitioners to sell a string of parcels of land for the construction of a coal railroad spur.

District Judge D. Brooks Smith held that the claims of petitioners accrued before September 17, 1983, i.e., more than four years before the filing of their complaints (A 16-26) and that the complaints were consequently untimely; he granted the respondents' motion for summary judgment. (A 40).[1]

Petitioners contended in the District Court that the complaints were filed in good time because the four-year statutory period had been tolled under *American Pipe* by the filing in 1983 of an action by another landowner along the railroad right-of-way, Dorothy Loughman. Petitioners claimed that the *Loughman* action was filed against the present respondents on behalf of a class of which petitioners were members.

Judge Smith rejected the tolling argument. The District Court found that after the original Loughman complaint was filed in April, 1983 (containing the barest class action allegations), seven companion cases to the *Loughman* case were filed separately against the same defendants in July, 1983, without class allegations and without any pretense of joinder or intervention in the *Loughman* case, by the same law firm that represented Ms. Loughman (and which represents these petitioners).[2] The severally filed cases were consolidated pursuant to court order of

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[1] References in the form "(A __)" are to pages of the appendix to the petition, and in the form "(Pet. __)" are to pages of the petition.

[2] As the cases were filed separately the District Court assigned separate docket numbers to each: Civil Action Nos. 83-1674, 1675, 1676, 1677, 1678, 1679, and 1754. The background of the *Loughman* case and its companions is described in *Hughes v. Consol-Pennsylvania Coal Co.*, 945 F.2d 594, 607-609 (3d Cir. 1991).

August 25, 1983, a procedure inconsistent with class action status,[3] and, in April, 1985, the half-hearted class allegations of the original *Loughman* complaint were abandoned by a third amendment filed by that law firm. The judge's review of the record (A 27-28) confirms the above:

> [T]he original complaint in the Loughman cases, filed on behalf of Ms. Loughman only on April 19, 1983, contained class action allegations. Thereafter, in July, 1983, Loughman's counsel (who also is counsel for plaintiffs in this matter) filed complaints on behalf of the remaining seven Loughman plaintiffs, which complaints *lacked any class allegations*. At about the same time, an amended complaint repeating the class action allegations were filed on behalf of Ms. Loughman.
>
> The eight Loughman cases were *consolidated* in August, 1983 and, more than a year and a half later, in April, 1985, plaintiffs' counsel filed a Third Amended Complaint on behalf of each plaintiff. *None of the April, amended complaints contained class action allegations*. This Court denied plaintiffs' Motion for Class Certification in December, 1988, citing plaintiffs' failure to comply with Local Rule 34. (emphasis supplied).

The judge found that the petitioners, all "neighboring landowners" of Ms. Loughman, knew about, or should have known about, their claims (and the highly publicized claims of their neighbors) in the period October 1982 to April 1983 (A 16-17). It was a favorable verdict in *Loughman* in early 1987 (A 4) that prompted the filing of the *Anderson Cases* in September, 1987.[4]

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[3] "[T]he most frequently used *alternative* to a class suit for handling multiparty claims is a consolidated action brought by the individual parties . . ." 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶23.45 [3], at 23-327 (2d ed. 1990) (emphasis supplied).

[4] In respect of Loughman's RICO claims the verdict was set aside by judgment n.o.v.; that judgment was affirmed. *See Hughes*, 945 F.2d at 609-11.

Indicating that the *Loughman* complaint could not be fairly regarded as a class action under *American Pipe*, Judge Smith emphasized that Loughman had not complied with local District Court Rule 34(c), which requires a would-be class action plaintiff to move for a determination that the case may be maintained as a class action within 90 days after the filing of the complaint (unless the period is extended by the district court for good cause). (A 30, n.12). Ms. Loughman, without excuse, had not moved for such a determination until late 1988, i.e., *five years* after the filing of her complaint and well after trial and verdict in her case and its consolidated companions; her motion was denied on December 7, 1988. (A 28).

On their appeal to the Third Circuit, petitioners pursued their *American Pipe* contention. The Court of Appeals affirmed summary judgment for the defendants, without opinion (A 45).

REASONS FOR DENYING THE WRIT

Summary of Argument

The petition should be denied. The Anderson Cases were decided correctly. Petitioners were well informed about their neighbors' claims in 1982-83 but chose to await a favorable jury verdict in *Loughman* before filing in 1987. *Loughman* and its companions, to which petitioners would tack their claims, were neither conceived nor maintained as genuine class actions, and Ms. Loughman failed utterly to comply with a reasonable local rule designed to give respondents notice of Loughman's intention to file a class action.

The issues presented by petitioners are of no importance to the development of the *American Pipe* doctrine because the viability of the petition turns on the unique procedural carelessness of Ms. Loughman and her companions.

I.

THE COURTS BELOW RIGHTLY DECIDED THESE ANDERSON CASES BECAUSE THE LOUGHMAN CASE AND ITS COMPANIONS WERE NOT MAINTAINED AS CLASS ACTIONS AND DID NOT COMPLY WITH LOCAL RULE 34(c).

It is clear from Judge Smith's review of the record (A 27-28) that the *Loughman* case and its seven companions, filed in early 1983, were neither conceived nor maintained as true class actions: the seven companion cases were filed as independent actions, without class allegations and without any pretense about joining Loughman's complaint, and the cases were consolidated in August, 1983, as separate actions. Loughman's complaint was itself amended in 1985 to abandon its class allegations by the law firm that represented Loughman and her companions and which represents the present petitioners.[5]

Even more egregious was Loughman's indifference to local Rule 34(c) of the United States District Court for the Western District of Pennsylvania. (The text of the Rule is set out by Judge Smith at A 30, n. 12.) That Rule is designed to ensure, in accordance with the rationale of *American Pipe*, 414 U.S. at 555, that a defendant will learn reasonably promptly that he faces a serious class action. Hence, within 90 days of the filing of her original class complaint (unless the period were extended for good cause), Loughman was under a duty to move for a determination that her action could indeed be maintained as such. She omitted to do so for five years.

Local Rule 34(c) is not applied with draconian severity, for it permits the plaintiff to show good cause for extending the 90-day period; and, even if the plaintiff neglects that course, the court will be forgiving if the plaintiff can show that the motion was made "as soon as practicable." *Slanina v. William Penn*

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[5] An amended complaint supersedes the prior complaint and waives prior claims not asserted in the amendment. *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987).

Publishing Corp,, 106 F.R.D. 419 (W.D.Pa. 1984) (Mansmann, D.J.) (where fears of reprisal are shown to prevent compliance with local Rule 34, and motion is made "as soon as practicable," latter test applied); *cf.* Fed. R. Civ. P. 23(c)(1) (court must determine whether class action can be so maintained "as soon as practicable").

Local Rule 34(c) is thus reasonable in conception, discretionary in implementation, and orders thereunder are reviewable only for an abuse of discretion. *See Walton v. Eaton Corp.*, 563 F.2d 66, 71 (3d Cir. 1977) (no abuse of discretion for U.S.D.C.E.D. Pa. to deny motion under counterpart local rule made 21 months after filing). The validity of such a rule cannot be seriously questioned, for it gives effect to the "as soon as practicable" test of Fed. R. Civ. P. 23(c)(1) and is thus authorized by 28 U.S.C. §2071 and Fed. R. Civ. P. 83. *Walton, supra* (approving counterpart local rule in Eastern District of Pennsylvania); *Green v. Philbrook*, 576 F.2d 440, 446 (2d Cir. 1978) (approving strict application of counterpart local Rule in District of Vermont).

Yet, Loughman failed to move for certification until 1988, *five years* after the filing of her original complaint and well after verdict in her case; the motion was rightly denied on December 7, 1988. Judge Smith consequently held that "[d]efendants reasonably relied upon the *Loughman* plaintiffs' failure to move for certification" and that it would be an abuse of *American Pipe* to grant the protection of that decision to petitioners, citing *Crown, Cork*, 462 U.S. at 354 (Powell, J., concurring). (A 30-31).

Federal courts permit the equitable tolling of statutes of limitations "only sparingly". *Irwin v. Veterans Admin.*, 111 S.Ct. 453, 457 (1990) (Rehnquist, Ch.J.). Such relief is not extended when (among other causes) "the claimant failed to exercise due diligence in preserving his legal rights". *Id.* at 458. Although petitioners here seek the equitable tolling of the statute of limitations, their informed indolence during the period that the statute was running bars consideration of their present appeal to equity.

II.

THE PETITION SHOULD BE DENIED BECAUSE THE ISSUES IT RAISES ARE PECULIAR TO PROCEDURAL ERRORS COMMITTED BY LOUGHMAN.

The question presented by the petition is not, as petitioners would have it, whether the simple failure of Loughman to comply with local Rule 34(c) ended the tolling of the statute of limitations for petitioners (Pet. i). Rather, as the District Court's review of the record indicates, the question presented is whether (a) the frivolous class action complaint filed in *Loughman*, (b) later amended to delete all class action allegations, (c) accompanied by seven companion complaints filed as independent actions by Loughman's attorneys and then consolidated, (d) with respect to which those attorneys moved for class certification five years (not 90 days) after filing, could have any tolling effect on the applicable statute of limitations for the benefit of these informed, yet indifferent, petitioners.

When the issue is stated correctly, it is plain that, at bottom, the petition involves no more than Ms. Loughman's peculiar disregard for procedural rules. This Court's intervention would not, therefore, enlarge instructively the jurisprudence of the *American Pipe* doctrine. The decision of the District Court was rightly affirmed summarily by the Third Circuit.

CONCLUSION

The petition should be denied. The decision below was correct in holding that *Loughman* was an invalid class action under which these *Anderson Cases* cannot be subsumed so as to toll the statute of limitations. The petition fails to present issues of the slightest general importance.

Respectfully submitted,

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